

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

3 EVDOKIA NIKOLOVA) Docket No. A 19-CA-877 RP
4)
4 vs.) Austin, Texas
5)
5 UNIVERSITY OF TEXAS)
AT AUSTIN) February 16, 2022
6

7 TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
8 VIA VIDEOCONFERENCE
9 BEFORE THE HONORABLE ROBERT L. PITMAN

10 APPEARANCES:

11 For the Plaintiff: Mr. Robert W. Schmidt
12 Crews Law Firm, P.C.
13 701 Brazos Street, Suite 900
Austin, Texas 78701
14
15 Mr. Robert S. Notzon
Law Office of Robert Notzon
1502 West Avenue
Austin, Texas 78701
16
17 For the Defendant: Mr. Benjamin L. Dower
Ms. Amy S. Hilton
18 Texas Attorney General's Office
300 West 15th Street
19 Austin, Texas 78701
20
21 Court Reporter: Ms. Lily Iva Reznik, CRR, RMR
22 501 West 5th Street, Suite 4153
Austin, Texas 78701
23 (512)391-8792
24

25 Proceedings reported by computerized stenography,
transcript produced by computer-aided transcription.

10:30:49 1 THE COURT: Good morning, everyone. Thank you
10:30:50 2 for joining me for this hearing today.

10:30:52 3 I'm going to ask the clerk to call the case and
10:30:53 4 if you could make announcements for the record, please.

10:30:56 5 THE CLERK: A 19-CV-877, Evdokia Nikolova vs.
10:31:03 6 University of Texas at Austin, for final pretrial
10:31:05 7 conference.

10:31:08 8 MR. SCHMIDT: Yes, your Honor. This is Robert
10:31:10 9 Schmidt, or Bob Schmidt, for Plaintiff Evdokia Nikolova.
10:31:11 10 And I also have today Robert Notzon, who's representing
10:31:15 11 Dr. Nikolova.

10:31:16 12 THE COURT: Mr. Smith, Mr. Notzon.

10:31:18 13 MR. SCHMIDT: Good morning, Judge.

10:31:19 14 THE COURT: Good morning.

10:31:20 15 MR. DOWER: And Benjamin Dower, Ben Dower for
10:31:24 16 U.T. Austin, along with my colleague, Amy Hilton.

10:31:55 17 THE COURT: Well, thank you both for joining me
10:31:56 18 today for a final pretrial conference. I want to cover a
10:31:59 19 number of issues. Typically what I will do is sort of go
10:32:02 20 through my list of things that would be, I think, of
10:32:07 21 interest to you about sort of jury selection issues, other
10:32:13 22 -- hopefully answering most of the questions that you'll
10:32:15 23 have about the upcoming trial. And then, obviously please
10:32:18 24 let me know at the end, if I have left any questions
10:32:21 25 unanswered or if you have any additional issues that you'd

10:32:24 1 like to raise with me.

10:32:25 2 Let me start by inquiring as to whether or not we
10:32:28 3 are still in the posture of needing to try this case. I'm
10:32:33 4 assuming that I would have heard otherwise but, Mr.
10:32:36 5 Schmidt, you're giving me a nod there.

10:32:40 6 MR. SCHMIDT: Yes, your Honor. I'm afraid that
10:32:41 7 that's the direction that we are heading.

10:32:42 8 THE COURT: Okay. That's fine. And that's what
10:32:44 9 we're here for. Obviously you're all very experienced
10:32:47 10 lawyers and you know the risks of going to trial, and I
10:32:50 11 don't need to review that with you. But if at any point,
10:32:53 12 you need any encouragement from me that I haven't already
10:32:57 13 given you about seeking a resolution of this case, then
10:33:01 14 let me know if there's anything I can do to encourage you
10:33:03 15 in that.

10:33:04 16 But I'm also here and available to give you a
10:33:08 17 jury trial in the case. Let me start by saying that, as
10:33:11 18 you all know, civil trials are always subject to being
10:33:17 19 bumped by criminal trials because of the Speedy Trial Act
10:33:20 20 and, indeed, I am -- regret to tell you that apparently
10:33:24 21 that's what's going on with your current setting. So let
10:33:27 22 me tell you what's going on. We're currently set in this
10:33:30 23 case for a March 7th jury selection. I have a case that
10:33:35 24 has been now specially set three times, but because of
10:33:38 25 COVID -- a criminal case, because of COVID, we have

10:33:41 1 provisionally set for the week before that, but it's going
10:33:46 2 to be, by all accounts, a two-week trial.

10:33:49 3 What I would like to do is explore two
10:33:52 4 possibilities with you. First, I would like to see
10:33:55 5 whether or not -- obviously I want to get this case tried.
10:33:57 6 And I know you're in a posture of being ready and counting
10:34:00 7 on that. Sometimes these criminal cases go away, as you
10:34:05 8 know, at the last minute, and so, I am somewhat hesitant
10:34:09 9 to release you at this point because there is some
10:34:14 10 possibility that March 7th will still be available to try
10:34:17 11 this case.

10:34:19 12 I will know that for sure next Friday. What's
10:34:23 13 the date? The 25th, because I'm actually picking that
10:34:28 14 jury the Friday before the Monday that we're set to start.
10:34:30 15 So I will know on the 25th whether or not that -- the
10:34:35 16 March 7th date is taken. And so, what I would like to do
10:34:40 17 is to go ahead and keep this sort of on the March 7th
10:34:45 18 docket in the event that something happens, and then, we
10:34:47 19 will let you know promptly on Friday morning, whether or
10:34:51 20 not we're in the process of picking a jury or the case has
10:34:54 21 been resolved or continued.

10:34:56 22 I know that's not ideal because it's -- you know,
10:34:59 23 it's keeping you kind of on the line. But, you know, I
10:35:02 24 hope you can understand, having been through the last two
10:35:05 25 years of not being able to try cases, we have a bit of a

10:35:09 1 logjam and we're trying to triage cases and shoehorn
10:35:13 2 things in where we can and be as sensitive and -- to your
10:35:18 3 needs and concerns as we can while, at the same time, you
10:35:21 4 know, getting as many cases tried as possible.

10:35:23 5 So let me first ask whether or not everybody is
10:35:27 6 willing to sort of stay on line until next Friday, and
10:35:31 7 then, we'll give you a hard answer about our March 7th
10:35:34 8 date.

10:35:34 9 Mr. Schmidt, does that work for the plaintiff?

10:35:36 10 MR. SCHMIDT: Of course it does. Yes, your
10:35:38 11 Honor.

10:35:38 12 THE COURT: Okay. Mr. Dower?

10:35:39 13 MR. SCHMIDT: We totally understand. Obviously.

10:35:42 14 MR. DOWER: Yes. Obviously. The one thing I
10:35:44 15 will say is that president -- or former president of U.T.
10:35:48 16 Austin, Greg Fenves, is trying his darnedest to appear in
10:35:54 17 person, notwithstanding him being out of subpoena range,
10:35:56 18 so he can provide testimony to the Court. And I expect
10:36:01 19 when I let him know that we're in hiatus until the 25th,
10:36:05 20 he will be none too pleased to hear that, but I think he's
10:36:09 21 just going to have to live with it, just like we are. And
10:36:11 22 we obviously respect where the Court is coming from there.

10:36:14 23 THE COURT: Okay. Thank you.

10:36:15 24 Now, I want to go ahead, then, and talk about
10:36:18 25 what we will do in the event that I give you the bad news

10:36:23 1 next week that I'm going to be in criminal trial during
10:36:26 2 the week that we've planned on. And I've looked very
10:36:29 3 closely -- I'll just tell you how I'm doing this and that
10:36:32 4 is, I looked for -- I'm stacked six or eight trials deep
10:36:36 5 every Monday. And so, what I do then is for cases that
10:36:41 6 we're having to sort of look for a trial date, I go and I
10:36:45 7 compare the file date of these cases with the cases that
10:36:50 8 are currently set, and the next date where you would be a
10:36:57 9 priority setting, based on the filing date of the case,
10:37:01 10 would be April the 4th for a jury selection.

10:37:05 11 So you don't have to tell me right now, but if
10:37:08 12 you could sort of talk to each other and to your clients
10:37:13 13 and witnesses about April the 4th, that would be the next
10:37:16 14 date where you would get the priority setting. So again,
10:37:22 15 I know that's not ideal way to do things, but that's the
10:37:25 16 only way I know to do it.

10:37:27 17 And what you could do is, if you don't mind, go
10:37:29 18 ahead and for planning purposes, let us know as soon as
10:37:33 19 you have an idea of whether that's going to work for you
10:37:35 20 or not. Just e-mail Ms. Golden, and if that is the case,
10:37:41 21 then we will sort of plug you in provisionally for April
10:37:45 22 the 4th and not put anybody ahead of you while there are
10:37:47 23 plenty of people on that date already, but nobody will be
10:37:49 24 ahead of you, again, barring another criminal case.

10:37:52 25 I think that we're not anticipating that the

10:37:56 1 April 4th date would be eclipsed by a criminal case at
10:38:00 2 this point, but that's not -- I don't have perfect ability
10:38:03 3 to predict that. So -- and in the event that that is a
10:38:07 4 conflict for you, then what we would do perhaps is wait
10:38:11 5 till next Friday and after I pick that jury, maybe a
10:38:15 6 Friday afternoon, or one afternoon the following week,
10:38:19 7 have another phone conference and kind of search for
10:38:21 8 another date.

10:38:22 9 So if April 4th is not going to work, if you'd go
10:38:25 10 ahead and talk to your clients and witnesses about the
10:38:27 11 next couple of months so that at that time, we'll be able
10:38:31 12 to have all the information we need to identify a date
10:38:34 13 that we can plug in to give you a firm setting.

10:38:37 14 So any questions about that? Or issues?

10:38:41 15 MR. SCHMIDT: No, your Honor. Thanks.

10:38:44 16 MR. DOWER: No, your Honor.

10:38:44 17 THE COURT: So let's go forward, then, and talk
10:38:46 18 about -- and all these things will apply, then, regardless
10:38:48 19 of whether we go on the 7th, or 4th, or other date in the
10:38:51 20 future. I'll sort of go through the list that I have of
10:38:54 21 things that would be relevant to you and hopefully answer
10:38:57 22 many of your questions in advance.

10:38:59 23 First of all, with regard to our COVID protocols,
10:39:04 24 we are opening back up for business under the following
10:39:09 25 sort of conditions. We are only summoning jurors who are

1 fully vaccinated. And so, if you have any issue with
2 that, let me know sooner than later, but that's the way it
3 will be. And if you have a problem, I'll give you full
4 opportunity to get your objections in and for the record.
5 But we just believe that the evidence is so strong that
6 doing otherwise really puts -- to call in jurors who
7 either haven't been vaccinated or not being able to assure
8 them that other fellow jurors have been vaccinated were
9 just -- we're just not going to do that in the Austin
10 Division.

11 While here, we're going to have everyone's
12 temperature taken at the door. We have an order currently
13 in force where everyone remains masked at all time unless
14 in a speaking role, that is, counsel and witnesses. We
15 are going to be trying this case hopefully in the special
16 proceedings courtroom on the first floor because it's
17 significantly larger than the other district courtrooms,
18 and it allows for easier social distancing both for jury
19 selection and trial.

20 So we'll be trying it in the first floor
21 courtroom. I can't speak for April 4th on that because we
22 don't know yet whether -- okay. Apparently that is
23 available that day, as well. But if we pick another date,
24 it might have already been reserved. In an ideal world,
25 we'll be trying this in the first floor special

10:40:46 1 proceedings courtroom.

10:40:48 2 We have Hepa filters that are portable that are
10:40:53 3 around the courtroom that are circulating and filtering
10:40:58 4 the air. For any witness, lawyer, or party who is not
10:41:05 5 fully vaccinated, you need to let us know that, and we're
10:41:09 6 requiring a test before -- within 24 hours of jury
10:41:17 7 selection and then, a daily rapid test every day after
10:41:21 8 that for any lawyer, witness, staff person, or party who
10:41:27 9 is not fully vaccinated.

10:41:31 10 MR. NOTZON: Is that before coming in the
10:41:33 11 courtroom, your Honor?

10:41:33 12 THE COURT: That's correct. Yes. We don't need
10:41:35 13 to see proof of evaluation. We'll take your word for
10:41:38 14 that. But if you're unvaccinated, we will require proof
10:41:41 15 of a negative COVID test. And again, everyone will remain
10:41:49 16 masked, including jurors, except when speaking. I am
10:41:56 17 going to ask that you consider questioning the witnesses
10:42:01 18 from the counsel table while standing, if you can. But if
10:42:06 19 there are issues with being able to see the witness or you
10:42:12 20 just have a strong preference to do it from the podium,
10:42:14 21 that's fine. Just let me know that and I'll let you do it
10:42:18 22 from the podium. I don't want you to sacrifice any
10:42:20 23 ability to see the witness or to see the jury. But we're
10:42:24 24 just trying to maximize distancing, if we can.

10:42:29 25 Any questions about COVID protocols, or

10:42:31 1 questions, or issues with any of that?

10:42:35 2 MR. DOWER: Yes, your Honor. Primarily for the
10:42:37 3 purposes of error preservation, because I recognize the
10:42:40 4 Court has very strong feelings about the subject, but if
10:42:43 5 we were to object to the only summoning fully vaccinated
10:42:46 6 jurors, would we just file a brief written objection?

10:42:50 7 THE COURT: Yes. Absolutely. If you want to
10:42:52 8 preserve that as an issue for appeal, that's great.

10:42:56 9 MR. DOWER: Okay. Thank you, your Honor. That
10:42:57 10 was all I had.

10:42:58 11 THE COURT: Okay. So we will pick a jury of
10:43:02 12 seven and that is -- there will not be any alternates, but
10:43:06 13 that gives us a cushion of one juror that we might lose
10:43:11 14 during a week trial, which is very rare, but that gives us
10:43:16 15 a cushion in the event we do lose a juror. So we'll pick
10:43:20 16 seven, but all seven again will deliberate. There won't
10:43:23 17 be any that will be designated as an alternate. Each side
10:43:27 18 will have three strikes at the conclusion of the jury
10:43:33 19 questioning.

10:43:34 20 I know that you have submitted a request to do a
10:43:37 21 jury questionnaire. Those are generally disfavored in
10:43:40 22 this division. I checked and the last time we did one was
10:43:43 23 in a very significant complex case six years ago. What I
10:43:46 24 will do, though, is assure you that I will incorporate as
10:43:49 25 many of the questions as you have indicated you would like

10:43:54 1 me to ask the jury in the Court's voir dire. I will also
10:43:59 2 give each side 20 minutes to do a lawyer-led questioning
10:44:05 3 of either followup of questions that I've already asked or
10:44:10 4 to ask questions that I haven't asked yet. So feel
10:44:15 5 free -- again, 20 minutes per side. I hope that at the
10:44:21 6 conclusion of the Court's questioning, I will have
10:44:25 7 included most of the questions that you have wanted asked,
10:44:28 8 but if not, that will give you your opportunity then to
10:44:31 9 question the panel.

10:44:35 10 Let's see, the way we will do this is, rather
10:44:38 11 than in a group of however many that we would be -- have
10:44:43 12 on the initial panel, the problem that I always try to
10:44:47 13 solve is not asking questions of folks who are so far
10:44:53 14 outside the strike zone that they really -- we're wasting
10:44:58 15 time soliciting answers from people who aren't going to
10:45:02 16 ever be on a jury.

10:45:03 17 The way I try to solve that problem is, I have --
10:45:07 18 I put in an initial group of people who are in the initial
10:45:12 19 strike zone, which is the seven jurors that will
10:45:17 20 ultimately be seated plus the six peremptory strikes that
10:45:22 21 you get -- so that's 13 -- plus four that is a cushion for
10:45:27 22 folks who are challenged for cause during the Court's
10:45:30 23 questioning. So very rarely do I dismiss more than four
10:45:34 24 jurors. But as a result of that, you will be able to
10:45:39 25 identify 17 folks who you will be asking questions of.

10:45:43 1 The remainder of the twelve or however many will
10:45:45 2 be on the panel, I will come out and explain this process
10:45:49 3 to them and say, listen, we're only asking -- I'm only
10:45:53 4 asking questions of this initial group of 17, but if more
10:45:57 5 than four of this panel -- of that initial group are
10:46:00 6 challenged and excused for cause, then I will go back to
10:46:05 7 that second group and say, all right, I'm going to go
10:46:09 8 through these questions that I've already asked the first
10:46:11 9 group with you. And so, I'll say, please listen because
10:46:14 10 in the event that we have to pull you from that second
10:46:16 11 group, I'm going to ask you to recall if you've had any --
10:46:21 12 you would have had any answers to the questions I've asked
10:46:22 13 the first group.

10:46:23 14 That typically works pretty well. I don't simply
10:46:26 15 ask, would you have had any answers. I go through and
10:46:29 16 talk about the different areas that I've already covered.
10:46:31 17 That seems to be the most efficient way to do it because I
10:46:34 18 rarely have to do that. But in the event I do, it takes
10:46:38 19 far less time than if we have twelve other people who have
10:46:41 20 no chance of being on this jury going on and on about why
10:46:45 21 they either do or don't want to be on the jury. So that's
10:46:49 22 the way that works. And again, you will be able to
10:46:53 23 identify visually the 17 people who are in that initial
10:46:56 24 questioning zone.

10:46:59 25 Let's see, any questioning about voir dire that I

10:47:04 1 haven't covered so far?

10:47:07 2 MR. SCHMIDT: I have just a few quick questions,
10:47:10 3 sir. One question is, I was just curious, approximately
10:47:12 4 how long do you spend on voir dire? I know that is
10:47:14 5 probably dependent case-by-case, but I'm just curious
10:47:17 6 about that.

10:47:17 7 THE COURT: I'm pretty efficient. That's a
10:47:19 8 euphemism for pretty quick. I'm of the school of thought
10:47:24 9 that, you know, the default should be that we should be
10:47:27 10 able to get seven people off the street and put them in a
10:47:30 11 jury box and they should hear the case. So I'm not
10:47:33 12 looking for reasons to get people off of a panel. So I
10:47:39 13 don't have the same interest that perhaps each of you do
10:47:42 14 about sort of following up. I'm pretty efficient and
10:47:46 15 don't ask too many followup questions.

10:47:48 16 What I'll do, really, what it ends up being is, I
10:47:51 17 will identify folks who perhaps because of the initial
10:47:55 18 answer they gave me, you might want to use some of your 20
10:47:57 19 minutes to go back and say when you told Judge Pitman so
10:47:59 20 and so, can you tell me a little more about that kind of a
10:48:02 21 thing.

10:48:03 22 MR. SCHMIDT: Okay. And then, another question
10:48:04 23 is, approximately how big is the panel?

10:48:06 24 THE COURT: You know, usually 23. So there will
10:48:12 25 be probably in this case -- I'll look again, but in a case

10:48:15 1 this size, we'll probably have 23 in the whole panel.

10:48:18 2 MR. SCHMIDT: Okay. And continue asking
10:48:21 3 questions, will we have a seating chart? Or can you or
10:48:23 4 someone in your office tell us how they're seated so we
10:48:26 5 can make our own seating chart?

10:48:29 6 THE COURT: We will give you a seating chart, but
10:48:30 7 it won't be until immediately prior because we won't know
10:48:34 8 until that morning. We'll randomize that morning after
10:48:36 9 they show up, and then, we'll plug in their names in the
10:48:39 10 seating chart and we will give that to you before they
10:48:42 11 come out but not long -- you won't have it long enough to
10:48:46 12 like do all of your Google searches before they come out.

10:48:49 13 MR. SCHMIDT: All right. Yeah. Of course. And
10:48:52 14 then, finally, on challenges for cause, do you generally
10:48:58 15 -- is there any particular way you handle those?

10:49:00 16 THE COURT: Great question. Yeah. What I will
10:49:02 17 do is, if I'm realizing that I'm having sufficient
10:49:06 18 concerns about a juror and the response they're giving me,
10:49:11 19 I will, you know -- then I will spend a little more time
10:49:14 20 with them, getting them to elaborate on whatever issue
10:49:17 21 seems to be of concern. If I at that point am concerned
10:49:22 22 enough that they are a problem, I will summon you to the
10:49:28 23 bench at that time because if it's that apparent, I want
10:49:32 24 to do that sooner than later because we need to pull, you
10:49:35 25 know -- we need to know, you need to know sooner than

10:49:38 1 later who's going to be excluded.

10:49:40 2 If I think it's just something that I think it's
10:49:42 3 going to be on you to convince me that it's a challenge
10:49:46 4 for cause, then what I will do is wait until after all of
10:49:52 5 the questioning and give you the opportunity to come up
10:49:55 6 before I release the jury and before you exercise your
10:49:58 7 challenges to give me -- to give you the opportunity to
10:50:04 8 convince me that certain jurors should be stricken for
10:50:06 9 cause.

10:50:07 10 MR. SCHMIDT: Thank you.

10:50:09 11 MR. DOWER: A related question, your Honor. Just
10:50:11 12 based on the physical layout of the courtroom, is it such
10:50:14 13 that it's easy for counsel to approach and have a quiet
10:50:17 14 conversation with your Honor without the jury being able
10:50:20 15 to hear them?

10:50:21 16 THE COURT: Yes. Especially in that courtroom
10:50:23 17 because it's on the far side and there's a microphone at
10:50:27 18 the side of the bench so that the court reporter can hear
10:50:30 19 you with a whisper. And then, we have a noise cancelling
10:50:36 20 kind of white noise that the clerk turns on so that --
10:50:41 21 yeah. Although you typically speak very loudly.

10:50:46 22 MR. DOWER: That question is very important to
10:50:48 23 me, specifically, your Honor.

10:50:50 24 MR. SCHMIDT: Afraid I suffer from that, as well.
10:50:52 25 Let's see how loud I am in court.

10:50:54 1 THE COURT: I'll shush you if I think that the
10:50:57 2 jury can hear you.

10:50:58 3 MR. DOWER: Appreciate that. Audible shush.

10:51:02 4 THE COURT: Exactly. All right. Any other
10:51:04 5 questions so far? Okay.

10:51:07 6 So now time limits. Twenty minutes for your
10:51:11 7 opening statements, 25 minutes for closings unless at the
10:51:14 8 conclusion of the evidence, you want to try to convince me
10:51:17 9 that 25 minutes is not sufficient. The use of
10:51:22 10 demonstratives during opening, I would ask that you confer
10:51:26 11 with each other and disclose whatever you're going to use
10:51:29 12 in your opening. Beware if you -- in a minute, we're
10:51:37 13 going to talk about pre-admitted exhibits. You can use
10:51:39 14 pre-admitted exhibits. Those are exhibits that will be --
10:51:42 15 have been agreed to pre-admission by everyone. So you can
10:51:47 16 use those with the consent of counsel during your opening.

10:51:55 17 Let's see, what else. Anything about opening
10:52:01 18 statements, something just flashed in my mind. Okay.
10:52:10 19 Typically I get juries picked before lunch the first day,
10:52:12 20 and so, you should expect that we will probably -- that
10:52:16 21 the typical chronology is that we'll pick a jury, give
10:52:20 22 them an hour for lunch and come back and hit the ground
10:52:23 23 running with opening statements. And the plaintiff needs
10:52:25 24 to be ready with couple of two or three hours of testimony
10:52:32 25 for that first day.

10:52:34 1 What really I feel very strongly about is, I know
10:52:37 2 it's a great inconvenience to witnesses to have to sort of
10:52:41 3 be on call and to be sitting out there, but it's better to
10:52:44 4 inconvenience one or two people than to have a jury of
10:52:46 5 seven waiting because witnesses are not lined up and ready
10:52:52 6 to go. So be ready, in other words, to hit the ground
10:52:55 7 running and start getting evidence in front of the jury on
10:52:59 8 the first day.

10:52:59 9 On that note, I observe a kind of an unusual
10:53:04 10 trial schedule that I want to talk to you about. I don't
10:53:08 11 think either of you have tried anything since I've done
10:53:11 12 this. So the first day, we'll pick a jury at 9:00. It
10:53:15 13 will be a fairly typical day. We will go until a natural
10:53:19 14 stopping point between 5:00 and 6:00 the first day. For
10:53:23 15 every successive day, however, we will start at 8:30 and
10:53:27 16 we will end at 3:30. We will have two 20-minute breaks
10:53:32 17 spaced evenly throughout the day with no lunch break. So
10:53:36 18 again, 8:30 to 3:30 with only two 20-minute breaks during
10:53:40 19 that time period.

10:53:41 20 Now, let me tell you what that does and why I do
10:53:43 21 it. If jurors know in advance that they're not going to
10:53:48 22 have a full hour for lunch, but that they bring sufficient
10:53:51 23 snacks for two 20-minute breaks to get them to 3:30, they
10:53:56 24 are extraordinarily grateful to be done by 3:30 to go pick
10:54:02 25 up kids, to beat traffic, because some of them are, you

10:54:04 1 know, three counties away, and it gives you the
10:54:07 2 opportunity to sort of have a couple of hours to prepare
10:54:09 3 for the next day, gives me the opportunity to do some
10:54:12 4 sentencings or to take care of other court business in the
10:54:15 5 afternoon. And juries don't mind not having -- not taking
10:54:21 6 lunches if forewarned. And we can get just as many trial
10:54:26 7 hours in as if -- believe it or not, as if we do 9:00 to
10:54:31 8 6:00 with two breaks and a lunch. Taking those three
10:54:33 9 breaks, one of those being an hour lunch, getting people
10:54:36 10 in and out of the courthouse and the jury room, it's
10:54:42 11 incredibly inefficient. And so, I hope that you'll be
10:54:45 12 able to adjust to that and find that that's an efficient
10:54:48 13 way of doing things.

10:54:49 14 Now, as for how many -- I do put you on a clock.
10:54:55 15 I'm going to -- I've looked at -- obviously having been
10:55:00 16 familiar with the potential evidence in the case in the
10:55:04 17 motions that have already been considered by the Court and
10:55:07 18 looking at the witness lists that you have submitted, what
10:55:09 19 I do is, I look at all of that and I give my best
10:55:12 20 good-faith estimate of how many hours it will take you to
10:55:16 21 try the case. I will give you a number and you will
10:55:21 22 cringe and cry and gnash your teeth, and you will say that
10:55:25 23 I'm so unfair and that there's no way you can do that, and
10:55:30 24 I will say, oh, yes, you can.

10:55:35 25 But here's what I will do. In the event that I

10:55:39 1 have misjudged and you get to the conclusion of your case
10:55:43 2 and you have been efficient in getting people on and off
10:55:47 3 the stand, not covering the same ground three and four
10:55:51 4 times, not fumbled with audiovisual, all of the things
10:55:57 5 that could sort of result in delays, if you've done all of
10:56:01 6 that and you still haven't been able to get all your
10:56:03 7 evidence in, I will always give you more time so that you
10:56:06 8 can do that.

10:56:06 9 If, however, at the conclusion of the number of
10:56:09 10 hours I've given you, I think you have not made the best
10:56:12 11 use, I will have had a margin where I've been making
10:56:15 12 little notes to make a very strong record about why the
10:56:18 13 number of hours I gave you was fair to begin with and why
10:56:22 14 I'm not going to give you more. I don't know that I've
10:56:24 15 ever -- it's only come up a couple of times and I don't
10:56:28 16 think I've ever not given anybody -- have I? One time. I
10:56:32 17 have. Sorry. I have, but I made a really good record and
10:56:37 18 didn't get reversed by having limited their numbers.

10:56:41 19 So I'm trying to be fair, but I also want to give
10:56:44 20 you a real incentive to be efficient, to not sort of go
10:56:49 21 over things four and five times. The number of hours --
10:56:55 22 and this is inclusive of -- we literally have a chess
10:57:00 23 clock and this is inclusive of your direct and then, your
10:57:03 24 cross-examination, as well. And so, we will toggle and
10:57:06 25 keep track. It's exclusive of your opening statement and

10:57:10 1 final argument.

10:57:12 2 So the number of hours that you will each be
10:57:14 3 allocated for this trial will be nine hours a side, and
10:57:18 4 again, that's direct and cross at the conclusion of which,
10:57:23 5 if you have -- typically people wail and gnash their teeth
10:57:28 6 and then, they use like two-thirds of what I've given
10:57:33 7 them. So don't feel like you have to use all of it, but
10:57:36 8 that's what I'm going to allocate for this trial.

10:57:40 9 Any questions about anything that we've covered
10:57:44 10 so far? Just housekeeping, mechanical things?

10:57:51 11 MR. DOWER: I think I'm supposed to say that's
10:57:53 12 unfair and gnash my teeth. That sounds bad for my molars,
10:57:57 13 so I'm not going to do that --

10:57:57 14 THE COURT: That'll get your beard a little bit.

10:57:58 15 MR. DOWER: I did have one question. Sometimes
10:58:03 16 there's little conferences with the Court about
10:58:06 17 objections, things like that. Does the clock stop during
10:58:08 18 those?

10:58:08 19 THE COURT: It does.

10:58:10 20 MR. DOWER: And will we be able to ask --

10:58:12 21 THE COURT: Let me say this, though. If you
10:58:13 22 start requesting bench conferences too frequently, I will
10:58:16 23 tell you that the next time you do that, we're going to
10:58:19 24 keep your clock running.

10:58:21 25 MR. DOWER: That is fair.

10:58:27 1 THE COURT: All right? Any other questions?

10:58:29 2 MR. SCHMIDT: I will just also gnash and --

10:58:32 3 THE COURT: For the record.

10:58:33 4 MR. SCHMIDT: -- cry and whine because I do think
10:58:36 5 that we probably will need additional time, but we will do
10:58:39 6 everything we can to be obviously as efficient as
10:58:41 7 possible.

10:58:41 8 THE COURT: And that's all I ask. Absolutely.

10:58:43 9 MR. SCHMIDT: Just need to make that note.

10:58:45 10 On the opening and on the use of demonstratives,
10:58:47 11 I just wanted to just clarify that. So I assume something
10:58:50 12 like a PowerPoint would fall within what you're talking
10:58:53 13 about and --

10:58:54 14 THE COURT: Well, no. You don't have to disclose
10:58:58 15 it in the sense like if all you're doing is, if it's an
10:59:00 16 outline of, you know -- I don't want you to have to
10:59:03 17 disclose your trial tactics in your opening statement. If
10:59:06 18 you're using anything that is going to be an exhibit at
10:59:09 19 trial or something -- anything more than like a PowerPoint
10:59:14 20 where you're just kind of putting -- it's tracking the
10:59:16 21 opening statements that you're giving, that's fine. But
10:59:19 22 if it's going to be more than that, if you're using
10:59:21 23 evidence or doing anything that's potentially
10:59:23 24 objectionable, run it by opposing counsel first.

10:59:27 25 MR. SCHMIDT: Okay. And that would include even

10:59:30 1 pre-admitted exhibits.

10:59:31 2 THE COURT: Yeah, but the only reason they're
10:59:33 3 pre-admitted is because you both agree to it. So that
10:59:36 4 shouldn't be objectionable.

10:59:37 5 MR. SCHMIDT: Okay. Great.

10:59:39 6 THE COURT: While you're talking about that
10:59:41 7 audiovisual, if you would, please, make a trip to the
10:59:44 8 courthouse and make an appointment with Ms. Golden to see
10:59:47 9 what we have, and see how it works, and see how it marries
10:59:52 10 up with the technology you have. There's nothing more
10:59:54 11 discouraging than you getting here and figuring out that
10:59:57 12 you didn't bring the right, you know, hardware or whatever
11:00:03 13 to connect up.

11:00:04 14 I will also say it's just something that has
11:00:07 15 happened during the last two jury trials I've had, and so,
11:00:10 16 I started kind of sharing this story is, often when you
11:00:14 17 are connected live to your laptop and you are bringing
11:00:18 18 things up and down, the default is to your desktop. And
11:00:23 19 in both of the trials, the desktop has inadvertently, I
11:00:28 20 believe, contained things that were highly prejudicial.
11:00:35 21 So I think it was unintentional, but make sure that you
11:00:38 22 have a clean desktop so that you don't inadvertently when
11:00:41 23 you're going back and forth between exhibits or deposition
11:00:44 24 video, or whatever -- one of them was -- on the desktop,
11:00:50 25 there was an open file that was a photograph of a news

11:00:56 1 account of a multimillion-dollar verdict in the kind of
11:01:03 2 case we were trying. Curiously the plaintiff was the one
11:01:06 3 who had that on.

11:01:08 4 MR. SCHMIDT: Yeah. That's not appropriate to
11:01:09 5 flash that up there.

11:01:11 6 THE COURT: So that sort of thing, just please --
11:01:15 7 you know, I had to give a curative instruction and, you
11:01:17 8 know, I took the jury up and one -- I asked the juror, I
11:01:22 9 said, did anybody see anything? And one juror said yeah,
11:01:25 10 and I said, come up here and tell me. Yeah, it was a
11:01:27 11 multimillion-dollar verdict in a case just like this, and
11:01:32 12 I said oh, boy. So anyway, just word to the wise.

11:01:35 13 Okay. So let's launch now into the more
11:01:39 14 substantive issues that I have, that is, your motions in
11:01:42 15 limine. I want to go ahead and get those ruled on, and
11:01:44 16 then, we'll talk a little bit about some objections that
11:01:47 17 you've made.

11:01:51 18 MR. DOWER: Your Honor, could I make sure that
11:01:53 19 we've covered the more logistical matters if we're at a
11:01:56 20 transition point.

11:01:57 21 THE COURT: Sure.

11:01:58 22 MR. DOWER: We have a witness who we would like
11:02:00 23 to -- he's physically living in California, and then, on
11:02:05 24 top of that, his wife has a health condition that makes
11:02:09 25 her particularly vulnerable for COVID, and he would very

11:02:13 1 much like to appear remotely. And I've already talked to
11:02:15 2 Mr. Schmidt about it. He's not opposed. Should I file a
11:02:19 3 motion to allow him to appear remotely, like via Zoom like
11:02:23 4 we're doing right now?

11:02:24 5 THE COURT: No. You can -- we'll just put in the
11:02:28 6 minutes of this hearing. I don't want this to be a
11:02:31 7 regular practice, but in the event that there is a special
11:02:36 8 concern about someone with any preexisting condition that
11:02:40 9 would be of concern and it's unobjected to, which Mr.
11:02:45 10 Schmidt, is that the case?

11:02:47 11 MR. SCHMIDT: That's correct. Yes.

11:02:48 12 THE COURT: Okay. Then I will certainly allow
11:02:50 13 that. We will have to talk about -- that will require
11:02:52 14 special setup on our end of setting up video. And we'll
11:02:58 15 have to talk about how we're going to do that and what
11:03:00 16 equipment we're going to have to bring in to get that
11:03:03 17 done. We'll do that and you can -- I'll leave that to Ms.
11:03:06 18 Golden and you can talk with her about that. But I will
11:03:10 19 allow you -- can you tell us what witness that is?

11:03:14 20 MR. DOWER: Sure. It's Dr. Tewfik. I believe
11:03:18 21 he's -- I think he's on, if not both -- I'm sure he's on
11:03:21 22 my witness list. He may also be on Bob's.

11:03:25 23 MR. SCHMIDT: He is.

11:03:27 24 MR. DOWER: Next quick logistical question, Greg
11:03:31 25 Fenves has very limited availability. If we need to take

11:03:38 1 him out of order, is that something I should just work
11:03:41 2 with Mr. Schmidt on? Or does the Court need to be
11:03:44 3 involved in that? I mean, I think, Bob, you were planning
11:03:47 4 to call him as an adverse witness, so maybe we can just
11:03:50 5 work through that. But if we were to stick with our
11:03:52 6 original setting, he's only available Monday and Tuesday
11:03:55 7 of the trial.

11:03:58 8 THE COURT: Unless he's not. University
11:04:00 9 presidents have put on their pants the same as everyone
11:04:04 10 else, and he's not going to get any special treatment in
11:04:07 11 this court.

11:04:08 12 MR. DOWER: I understand, your Honor. His pants
11:04:10 13 are being put on in Georgia, which makes it a little bit
11:04:13 14 trickier. But I understand.

11:04:14 15 THE COURT: Sure. Yeah. Obviously work out what
11:04:16 16 you can.

11:04:18 17 MR. DOWER: Okay.

11:04:18 18 THE COURT: But my favorite thing is when doctors
11:04:21 19 come in and say, you know, oh, gosh, you really need to --
11:04:24 20 I said how many years of my life have I spent in doctor's
11:04:27 21 offices waiting for them to maximize their profits. So
11:04:33 22 no. No one by virtue of their position is going to be
11:04:36 23 treated differently than any other witness.

11:04:39 24 MR. DOWER: Understood.

11:04:41 25 Some of the exhibits that I think both parties

11:04:42 1 are intending to offer are Excel spreadsheets that are --
11:04:47 2 there's no way they can be printed on eight-and-a-half.
11:04:50 3 Now, we can, you know, go to Kinko's maybe and do a big
11:04:54 4 blowup, but is that how the Court would prefer Excel
11:04:57 5 spreadsheets that have too many columns to be conveniently
11:05:01 6 printed on a normal eight-and-a-half-by-11 page?

11:05:05 7 THE COURT: You know, in terms of actually
11:05:09 8 introducing them in evidence and what format the jury
11:05:12 9 would have access to them?

11:05:13 10 MR. DOWER: Yes, your Honor.

11:05:14 11 THE COURT: I think that that will be digitally
11:05:15 12 available to them, and so, I don't think that format is
11:05:18 13 going to be a problem.

11:05:19 14 MR. DOWER: Okay. That was my question is, do
11:05:22 15 they have the ability to take into the jury room an Excel
11:05:26 16 spreadsheet in its native form?

11:05:27 17 THE COURT: All of the evidence will be digital
11:05:30 18 and available to them in the jury room.

11:05:34 19 MR. DOWER: Okay. That makes that very -- thank
11:05:36 20 you, your Honor. Oh, witness breakout rooms, will those
11:05:41 21 be available?

11:05:42 22 THE COURT: Yes. We have attorney conference
11:05:44 23 rooms and you'll have access to those throughout the
11:05:48 24 trial.

11:05:48 25 MR. DOWER: Okay. I think those are all of my

11:05:52 1 questions. Thank you, your Honor.

11:05:53 2 THE COURT: Okay. Mr. Schmidt?

11:05:54 3 MR. SCHMIDT: That reminded me of a question. Do
11:05:57 4 you want or will we be asked to provide paper copies of
11:06:00 5 any of our exhibits?

11:06:03 6 THE COURT: Only in the event that you feel like
11:06:05 7 it's something that you want me to be looking at. You'll
11:06:10 8 have the ability obviously to be -- to put it up on the
11:06:13 9 screen and -- but if you want to give the Court a courtesy
11:06:20 10 copy if it's something that you want me to have the
11:06:21 11 ability to look at, that's fine. But I typically am
11:06:24 12 paperless and I will be looking -- and I have a monitor at
11:06:27 13 the bench where I'm looking at whatever evidence you're
11:06:30 14 referring to. And so, unless you feel particularly that
11:06:32 15 you want me to have a hardcopy, I don't need hardcopies of
11:06:35 16 anything.

11:06:36 17 MR. SCHMIDT: Okay.

11:06:39 18 THE COURT: Okay. Great. Well, let's go, then,
11:06:41 19 into the motions in limine. Starting with the plaintiff's
11:06:45 20 motions, I think we have five -- and I appreciate
11:06:50 21 particularly the fact that you have been in communication
11:06:54 22 with each other on these, and you have indicated to me
11:06:58 23 what is opposed and unopposed. That's particularly
11:07:01 24 helpful.

11:07:02 25 One is granted as unopposed. Two is granted,

11:07:08 1 except for I do believe that the defendant's sort of
11:07:16 2 condition about the work done by the plaintiff's husband,
11:07:23 3 that is something that -- especially with regard to the
11:07:27 4 dossier, I think that that is something that they will be
11:07:32 5 able to get into, but with that exception, then I will
11:07:36 6 grant No. 2.

11:07:38 7 No. 3, again, with the reasonable exception of
11:07:43 8 the Plaintiff's W-2 forms as indicated in the defendant's
11:07:47 9 response, that will be granted, as well. And then, 4 and
11:07:51 10 5 are granted as unopposed.

11:07:53 11 Any questions about that?

11:07:56 12 MR. SCHMIDT: (Moves head side to side.)

11:07:58 13 THE COURT: Okay. Moving on, then, to the
11:07:59 14 defendant's, 1 is granted as agreed. Two, granted as
11:08:07 15 agreed. Three, granted as agreed. Four will be denied.
11:08:21 16 I think that that's probative. And if you have any
11:08:25 17 specific objection as it's coming in, you can do that
11:08:28 18 during trial. No. 5, I agree with the defendant's
11:08:35 19 objection there about pattern or practice. And so, I'll
11:08:38 20 grant that. And again, that's sort of a term of art that
11:08:46 21 it does not pertain in this kind of case. So I'll grant
11:08:52 22 5.

11:08:52 23 Six is denied as being probative. Seven, denied
11:09:00 24 on the same ground. Eight, 9 and 10 are sort of ones that
11:09:05 25 I wanted to visit with you a little bit about. And this

11:09:11 1 is talking about medical care, treatment, and the ability
11:09:16 2 for the plaintiff to comment on her own mental medical
11:09:27 3 psychological conditions. What I would intend to do in
11:09:32 4 these categories is, obviously if we're talking about
11:09:34 5 expert testimony on any condition, that would require
11:09:41 6 expert -- the disclosure of a report and -- then I get
11:09:49 7 that. But the plaintiff is going to be able to talk about
11:09:51 8 sort of her experiences. I mean, that's the nature of
11:09:55 9 these kinds of damages.

11:09:56 10 So let me just ask sort of, Mr. Dower, if you
11:09:59 11 could tell me what you're wanting to really avoid there,
11:10:02 12 understanding that the plaintiff is going to be --
11:10:07 13 understandably going to be able to talk about her own
11:10:11 14 experience of what she's gone through and her
11:10:13 15 interpretation of those experiences.

11:10:15 16 MR. DOWER: Yes, your Honor. I think, of course,
11:10:17 17 she'll be able to talk about her mental state, her mental
11:10:20 18 anguish from her own perspective. I think what we're
11:10:22 19 trying to avoid is something that would effectively
11:10:24 20 operate as a medical diagnosis like my denial of tenure
11:10:28 21 gave me clinical depression or made me bipolar. Something
11:10:31 22 that's -- really goes outside the realm of just lay
11:10:34 23 testimony about someone's feelings and experiences and
11:10:39 24 crosses over into the realm of sort of a layperson's
11:10:42 25 self-diagnosis.

11:10:43 1 THE COURT: Sure. Okay.

11:10:44 2 Mr. Schmidt.

11:10:45 3 MR. SCHMIDT: Your Honor, Dr. Nikolova is
11:10:50 4 obviously going to be testifying about going through
11:10:52 5 severe depression as a result of what has happened here.
11:10:57 6 She also has filed and been granted FMLA leave for having
11:11:02 7 depression. Also has seen multiple medical providers. So
11:11:07 8 I think the only thing that we would like to be able to
11:11:09 9 have her talk about is that she, again, saw medical
11:11:15 10 providers, you know, that she's gone to therapy, tried to,
11:11:17 11 you know, do things to treat herself and to deal with
11:11:21 12 this.

11:11:22 13 You know, we do agree, you know, she can't say,
11:11:24 14 my therapist told me I have depression. And so, we
11:11:28 15 certainly understand that, but we can -- I think she can
11:11:30 16 testify as to her own understanding of what her condition
11:11:32 17 is. And that's basically all we'd like to do. We'd also
11:11:36 18 point out, she -- in addition to FMLA, she had asked for a
11:11:39 19 reasonable accommodation because of her depression, which
11:11:42 20 was essentially granted. So those are the kind of things
11:11:45 21 that we see coming out and we'd like to present to the
11:11:48 22 Court and to the jury.

11:11:49 23 THE COURT: All right. As long as you don't
11:11:52 24 stray into sort of getting in front of a jury evidence of
11:11:55 25 a diagnosis about which there is no expert testimony, then

11:11:59 1 that's fine. And, you know, I think you both are
11:12:02 2 experienced, you know how to kind of manage that and stay
11:12:05 3 within those sort of boundaries. But if not, Mr. Dower,
11:12:09 4 you object and we can talk about it more.

11:12:13 5 MR. DOWER: Yes, your Honor.

11:12:13 6 THE COURT: Okay. So what I'm going to do, then,
11:12:15 7 is deny those with the understanding that if you do have
11:12:24 8 concerns about the direction of any questioning or the
11:12:28 9 response to any answer, Mr. Dower, then you can approach
11:12:30 10 and we'll discuss it.

11:12:34 11 Eleven is granted as agreed, as is 12. Okay.
11:12:49 12 Thirteen, sort of tell me what we're getting into there,
11:12:53 13 Mr. Dower, and what you're concerned about.

11:12:56 14 MR. DOWER: I guess -- well, I don't really see
11:12:59 15 this as being a probable issue. I think we're just -- we
11:13:02 16 don't want to be blind-sided by a new damages model during
11:13:07 17 the trial that we -- because we did depose the two experts
11:13:11 18 on damages. And so, we're just trying to prevent sort of
11:13:15 19 unfair surprise during trial with things that weren't
11:13:18 20 disclosed.

11:13:19 21 THE COURT: Okay. And, Mr. Schmidt, you get
11:13:21 22 that, right?

11:13:22 23 MR. SCHMIDT: Yeah, we get that. And we would
11:13:24 24 only ask -- we'll probably have our expert update their
11:13:27 25 damage model through the date of trial. And then, of

11:13:30 1 course, we made reference to emotional stress,
11:13:33 2 compensatory damages wouldn't be covered by this. But
11:13:36 3 that's the only -- we don't intend to offer new categories
11:13:40 4 of damages.

11:13:40 5 THE COURT: Okay. Great.

11:13:42 6 So I'll grant that -- I mean, I'm sorry, I'll
11:13:47 7 deny that, but, Mr. Dower, you can obviously re-urge this
11:13:50 8 if we stray into that territory.

11:13:52 9 Fourteen through 17, I'm going to deny only
11:13:55 10 because those are covered by the rules of evidence, and I
11:13:57 11 typically deny things that are otherwise prohibited by the
11:14:00 12 rules of evidence, but obviously without prejudice to you
11:14:02 13 using those if you become concerned during trial. And 18,
11:14:11 14 I think that I get that you need to establish predicate
11:14:14 15 before you can get in, but I think that there is a world
11:14:16 16 in which you could get in that evidence.

11:14:19 17 So I mean, Mr. Dower, as long as you understand
11:14:24 18 that -- as long as they establish first that there's a
11:14:30 19 person that's similarly situated, then with that, I would
11:14:33 20 be inclined to deny it and leave you the opportunity to
11:14:37 21 object in the event that they have not done that.

11:14:42 22 MR. DOWER: That's fair, your Honor. I think
11:14:43 23 this will probably be a longer topic of discussion once we
11:14:45 24 get to the exhibits. So understood.

11:14:50 25 THE COURT: Okay. Very good.

1 So 19, for the same reasons I believe it's
2 covered by the rules of evidence, so I'll deny that
3 without prejudice to you urging that at a later time.

4 So now that we do move to the exhibits, let me
5 ask you this. It seems to me that many, if not most, of
6 the objections that you have are objections that would
7 best be left for trial in the context of the trial and may
8 or may not sort of require any rulings in advance. What I
9 would like to do is have you -- without going exhibit by
10 exhibit today, what I would like for you to do is to
11 confer, once again, and to narrow down exhibits that you
12 absolutely need a ruling in advance because it's so
13 important to sort of maybe the theory of your case or how
14 you would approach things.

15 If you absolutely need a ruling, if you could
16 resubmit that in a format of -- I would like a pleading
17 from the two of you that would be -- these are the
18 exhibits that we agree there are no objections to and we
19 have no objection to pre-admitting them. These are
20 exhibits that we still have remaining objections to, but
21 they are ones that can be raised at trial. And three, the
22 small subset of issues that you would like to have another
23 conference before trial and get a pretrial ruling on those
24 exhibits.

25 MR. DOWER: That sounds good to me, your Honor.

11:16:36 1 I'll say in the category three, I think we're probably
11:16:39 2 going to need the Court to resolve some of the who is a
11:16:42 3 proper comparator because it has such a profound influence
11:16:45 4 on witness preparation we need to be able to talk about.

11:16:50 5 THE COURT: I'll take a look at that and that
11:16:51 6 will be the subject of our next visit, and I'll make those
11:16:54 7 rulings in advance of the trial so that you'll have that
11:16:56 8 information.

11:16:58 9 MR. SCHMIDT: Your Honor, we'll submit some
11:17:00 10 additional documentation on that, too, then.

11:17:02 11 THE COURT: Okay. Super. Okay.

11:17:04 12 So that's everything that was on my list. Let me
11:17:06 13 now give you the opportunity to follow up any questions
11:17:10 14 you might have.

11:17:11 15 Mr. Schmidt.

11:17:12 16 MR. SCHMIDT: Your Honor, I had one question for
11:17:13 17 you. We recently received a ruling on defendant's motion
11:17:19 18 to strike one of our experts. It is a professor who's an
11:17:26 19 expert on the field of discrimination and how it manifests
11:17:30 20 itself, things like student evaluations that have a bias,
11:17:33 21 particularly in the field of engineering where 80 percent
11:17:36 22 of the students are male. There's a lot of evidence that
11:17:39 23 that is, in fact -- that student evaluations can be
11:17:43 24 biased. U.T.'s own diversity dean who deals with this
11:17:49 25 issue says yes, we look at those studies, we abide by

11:17:53 1 those and we give them credence. Dean Sharon Wood, who's
11:17:57 2 a figure in this case, also was aware of that.

11:17:59 3 That kind of testimony as well as just there's
11:18:03 4 some other testimony about, for example, whether a woman
11:18:07 5 might discriminate against a woman. In this case, as you
11:18:11 6 probably are aware, Dean Wood is female, and she was the
11:18:15 7 first person to make a recommendation to deny tenure. And
11:18:19 8 there's a whole field of study that talks about that women
11:18:22 9 can, in fact, discriminate against women. So the
11:18:27 10 magistrate or Judge Hightower struck the testimony of our
11:18:31 11 witness that was going to be talking about that.

11:18:33 12 And I just wanted to kind of float with you and
11:18:36 13 let you know, I would like to file a motion for you to
11:18:42 14 review and consider that order. I do think there's some
11:18:46 15 very fatal flaws in that order and just wanted to let you
11:18:49 16 know that that may be coming your way. I don't know what
11:18:51 17 your position is on, you know, rulings by magistrates on
11:18:56 18 pretrial matters. But.

11:18:57 19 THE COURT: Obviously I give them great
11:19:00 20 deference, but if it's a case I'm going to try, I'll take
11:19:02 21 a look at it and I'm happy to consider any motions to
11:19:08 22 reconsider and will absolutely do that.

11:19:12 23 MR. SCHMIDT: Thank you sir. I wanted to just
11:19:14 24 raise that to you.

11:19:15 25 THE COURT: Sure. Great.

11:19:16 1 MR. SCHMIDT: That is all I have.

11:19:17 2 THE COURT: Okay. Mr. Dower.

11:19:19 3 MR. DOWER: I have one last thing and I'm
11:19:21 4 slightly hesitant to raise it because it sounds petty,
11:19:24 5 even from my own mind. But the plaintiff's statement of
11:19:27 6 the case is very long. It's like -- it's supposed to be a
11:19:32 7 half page and I think it's more like three-fourths,
11:19:36 8 basically twice my word count. So I didn't want to put --
11:19:43 9 can we talk a little bit more parity there in terms of
11:19:46 10 length?

11:19:46 11 THE COURT: No. Actually, I have a better
11:19:49 12 suggestion -- I'm sorry, and I'm so glad you raised that
11:19:51 13 -- is I want you both to come up together with one
11:19:53 14 unobjectionable statement of the case. And I don't think
11:19:57 15 we saw any -- and it can be however long you want it to
11:20:00 16 be. How's that?

11:20:02 17 MR. SCHMIDT: Great. And, Mr. Dower, and your
11:20:04 18 Honor, I actually started a revision of that. After I had
11:20:08 19 filed it, I had some concerns about it being too long.
11:20:10 20 So, Ben, I will work with you on that and we'll --

11:20:14 21 MR. NOTZON: That's Mr. Schmidt not blaming me.
11:20:17 22 My fault and I take total responsibility.

11:20:20 23 MR. SCHMIDT: This topic was discussed prior to
11:20:24 24 filing. But.

11:20:26 25 THE COURT: That's fine. I know you two get

11:20:28 1 carried away sometimes in your zeal.

11:20:34 2 MR. SCHMIDT: We will work with --

11:20:36 3 THE COURT: What we need is a very neutral
11:20:39 4 statement of the case that just -- you know, the purpose
11:20:42 5 of this is just to let the jury know why they're there and
11:20:45 6 so, a very neutral, mutually agreeable statement of the
11:20:52 7 facts of the case, that will be great.

11:20:54 8 And while I'm thinking of it, something else
11:20:57 9 we're going to need if you could start working on is, if
11:21:00 10 you could get together to work on a joint submission that
11:21:04 11 is proposed jury instructions where you red line whatever
11:21:09 12 your disagreements are so that we have one document in
11:21:12 13 Word format that we can go through, and it's easy for us
11:21:15 14 to see what the disputes are and be able to more easily
11:21:21 15 incorporate our rulings on which of you -- which of your
11:21:25 16 either inclusion or the language or exclusion, which is
11:21:30 17 much easier for us to do if it's done in that format.

11:21:33 18 MR. DOWER: Your Honor, I'm hesitant to ask for a
11:21:35 19 deadline, but do you have a deadline for when you would
11:21:39 20 like that submitted?

11:21:40 21 THE COURT: No. Any time before the trial is
11:21:43 22 fine. That will not be anything that we talk about until
11:21:47 23 our charge conference.

11:21:48 24 MR. DOWER: Okay. Thank you, your Honor.

11:21:50 25 THE COURT: Unless you need a deadline, I'm happy

11:21:52 1 to give you one.

11:21:53 2 MR. DOWER: Before the trial is a good deadline.

11:21:57 3 MR. SCHMIDT: You could give Mr. Dower a deadline

11:21:58 4 and we'll -- he needs a deadline but not --

11:22:02 5 THE COURT: Okay. Great. So the way it stands

11:22:05 6 now is, we're going to be in touch with you next Friday

11:22:08 7 and we'll either say we -- between now and then, you'll

11:22:13 8 let us know whether April 4th will be our backup date.

11:22:18 9 Next Friday, we will be in touch with you and tell you

11:22:21 10 that either we picked a jury and we're going to go with

11:22:24 11 April 4th, or we haven't picked a jury and we'll go on

11:22:27 12 March 7th, or we picked a jury and April 4th is not

11:22:31 13 working for you so we'll get on the line and look for

11:22:35 14 other dates.

11:22:38 15 Final thing, a note passed to me that we have not

11:22:42 16 gotten stipulated facts from you, so if you could work on

11:22:44 17 that, that'd be great. It's always helpful.

11:22:49 18 MR. SCHMIDT: Yes, your Honor.

11:22:49 19 THE COURT: Okay. Very good. Any last

11:22:51 20 questions? Complaints?

11:22:54 21 MR. NOTZON: (Moves head side to side.)

11:22:55 22 THE COURT: Comments? All right. Good.

11:22:57 23 Well, thank you all so much. Looking forward to

11:22:59 24 this. You are encouraged to continue exploring ways to

11:23:08 25 resolve this case other than going to trial. Always happy

1 for you to continue to do that and know that all of you
2 are accustomed to doing that and good at it. So please
3 continue to work on it. And we will be in touch with you
4 next Friday and let you know when we're going to proceed.

5 MR. SCHMIDT: All right.

6 MR. NOTZON: Thank you, your Honor.

7 MR. SCHMIDT: Thank you, your Honor.

8 THE COURT: Thank you all. Have a nice day.

9 MR. SCHMIDT: You too.

10 (Proceedings concluded.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
Registered Merit Reporter, in my capacity as Official
Court Reporter of the United States District Court,
Western District of Texas, do certify that the foregoing
is a correct transcript from the record of proceedings in
the above-entitled matter.

I certify that the transcript fees and format comply
with those prescribed by the Court and Judicial Conference
of the United States.

WITNESS MY OFFICIAL HAND this the 21st day of February,
2022.

Lily Iva Reznik
~~~~~  
LILY I. REZNIK, CRR, RMR  
Official Court Reporter  
United States District Court  
Austin Division  
501 West 5th Street,  
Suite 4153  
Austin, Texas 78701  
(512) 391-8792  
SOT Certification No. 4481  
Expires: 1-31-23